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No. 92-1123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,
Petitioner,

v.

U.S. PHILIPS CORPORATION, NORTH AMERICAN PHILIPS CORPORATION, N.V. PHILIPS GLOEILAMPENFABRIEKEN,
and
WINDMERE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

A judge and two juries in Florida found that Philips had no valid trade dress rights and violated the antitrust laws. A judge in Illinois then determined that Philips had a full and fair trial on the trade dress claim in Florida and therefore gave the Florida judgment preclusive effect to avoid relitigation of those issues. The question in this case is whether the Federal Circuit was wrong to vacate the Florida judgment and thereby free Philips of that preclusive effect based on a rule of automatic vacatur when the parties to an appeal settle their dispute.

Respondents and the Government have offered no persuasive argument to support such a rule. Indeed, respondents do not even try, but instead defend the decision below by mischaracterizing it as a case-specific exercise of "discretion"[1] (RBr 12-30; *Id.* at 31-38 (defending "practice of *permitting* courts to vacate judgments") (emphasis added)).[2] And a careful analysis of precedent and the relevant policies supports the *opposite*

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[1] Citations are: Respondents' Brief "RBr," the Government's Brief "USBr," and Product Liability Advisory Council's Brief "PLACBr."

[2] An absolute rule compelling vacatur at the request of settling parties, without any exercise of discretion by the court of appeals, is not seriously urged by either respondents, the Government, or PLAC. *See* RBr 18-21; USBr 10 n.10, 18 n.19, 26 n.26, 27 n.27; PLACBr 13. Yet, as the Government recognizes (USBr 8 n.9), the Federal Circuit's implementation of the practice of granting vacatur at the request of settling parties *is* automatic. It refused to consider any of the compelling factors in this case which militate so strongly against vacatur, and respondents' characterization of the Federal Circuit's decision as a fact-intensive evaluation with a case-specific decision is totally unsupported by the Federal Circuit's opinion.

approach – a general rule *against* vacatur when private parties simply settle on appeal.[3]

To begin with, the question of when, if at all, to vacate district court judgments on settlement is fully open to proper resolution on its merits. Precedents have not given the question an answer, or even full consideration in an adversarial context. In particular, the question is not resolved by *United States v. Munsingwear*, 340 U.S. 36 (1950), which deals with vacatur when mootness is caused by extra-litigation events, *i.e.*, by "happenstance."

On the merits, the vacatur question requires balancing of the judicial system's interest in finality – elaborated in this Court's decisions approving nonmutual collateral estoppel[4] – with an assessment of the fairness to a losing party of giving an unreviewed judgment preclusive effect. In fact, the law of preclusion already strikes that balance firmly in favor of finality. As long as appeal is available as a matter of law, preclusive effect can be given a district court judgment, even if it has not yet been or never will be reviewed on appeal. It leaves to the court considering preclusion (here, the Illinois court) any case-specific determinations that might make preclusion unfair. A rule against vacatur retains that safety valve to protect fairness concerns while respecting finality interests. But a rule of automatic vacatur, such as was applied by the Federal Circuit here, obliterates finality regardless of fairness.

A rule against vacatur on settlement not only accords with the balance of interests struck by the law of collat-

[3]The Government repeatedly argues for the application of special considerations in government cases (USBr 17, 18 n.18, 19, 24). That question is not presented in this case.

[4]*Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

eral estoppel, but should predictably produce less, rather than more, litigation. Among other things, a rule against vacatur promotes settlement prior to trial. The rule also serves other public interests and the interests of third parties.

Finally, Izumi should have been allowed to intervene in this case to oppose vacatur. Izumi has a large stake in the outcome, and it clearly and in a timely manner brought this issue before first the Federal Circuit and now this Court.

I. THIS COURT'S PRECEDENTS DO NOT REQUIRE VACATUR UPON SETTLEMENT

Whether and in what circumstances a court of appeals should order vacatur of a lower court's judgment when the parties on appeal settle their claims is a question of federal common law. Contrary to respondents' apparent suggestion (RBr 18), no statute or rule answers this question.[5] Nor does the answer lie in the Constitution's case-or-controversy requirement. That requirement provides standards for determining when a case becomes moot, but as the Government acknowledges (USBr 7-8), it does not mandate vacatur as a remedy in cases of mootness.[6]

[5]Although appellate courts are granted broad supervisory authority by 28 U.S.C. §2106, none of the courts suggest that the statute *prescribes* how that authority should be exercised with respect to the district court judgment when parties settle on appeal. *See National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 765 (9th Cir. 1989) (citing §2106 and denying motion to vacate). Accordingly, there is no "statutory construction" that controls.

[6]If anything, Article III should support a rule *against* vacatur. The most natural meaning of that prohibition in a moot case would be that an appellate court should simply dismiss the appeal, thereby removing the case from *its* jurisdiction, and take no substantive action such as ordering vacatur of the judgment below.

The Court's precedents firmly establish that a district court judgment should be vacated to prevent unfair collateral consequences when mootness arises by extra-litigation events, *i.e.*, "happenstance."[7] They do not, however, indicate that vacatur is required when mootness arises out of the parties' voluntary settlement. Indeed, despite vigorous efforts, respondents and the Government are simply unable to establish that the Court has already conclusively resolved this question (RBr 17; USBr 9-10). This appeal presents the *first* opportunity for the Court to consider the issue of vacatur on settlement in an adversarial context, and to define the proper mode of analysis for the courts of appeals.

Munsingwear itself did not address mootness resulting from settlement.[8] Moreover, this Court has strongly sug-

[7] *Munsingwear*, 340 U.S. at 40. Respondents assert that *Munsingwear* (dealing with pricing of a regulated product) involved mootness caused by the action of a party, the United States, rather than happenstance, because it was U.S. governmental action (deregulation) that led to the mootness. The Court in *Munsingwear*, however, never so characterized the action. Indeed, the Government acknowledges that the *Munsingwear* mootness was due to happenstance (USBr 11). *See* note 8, *infra*.

[8] Nor do cases cited by the Government at USBr 12, 13 n.12. Moreover, these and other cases involving a government as a party illustrate an important point for *government* cases: a change of policy can moot a case through new legislation, new regulations, expiration of administrative orders, or new publicly announced interpretations of governing law. When that happens, appellate review is made unavailable "as a matter of law," Restatement (Second) of Judgments §28 (1982), and not simply by the party's choice *as a litigant*. Such a formal change of government policy is not purely a litigation decision but, instead, is a legal action having "independent legal significance." *United States v. Western Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir.), *cert. denied sub nom. MCI Communications Corp. v. United States*, 498 U.S. 911 (1990). Because of the independent legal effect of such a change of policy, it is an extra-litigation event, *i.e.*, happenstance as in *Munsingwear*, as distinguished from a litigation-based decision to forego an appeal or settle on appeal.

gested, if not actually held, that *Munsingwear* turned on the fact that the case was rendered moot by happenstance. *See Karcher v. May*, 484 U.S. 72, 82-83 (1987) (distinguishing *Munsingwear* happenstance from actions within the control of the party). While respondents (RBr 17) and the Government (USBr 11-12) dismiss *Karcher* as a case not involving mootness, the *Karcher* Court plainly linked *Munsingwear* to cases in which the controversy becomes moot due to extra-litigation circumstances and distanced *Munsingwear* from cases in which the controversy ends when the losing party declines to pursue its appeal.[9]

The deep division among the courts on whether to vacate on settlement, recognized by the Government,[10] undermines the view that there is a clear-cut, established practice on this question. And recently, this Court itself has indicated that vacatur is not always required, or at least that the question is open. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 124 L. Ed. 2d 1, 15 (1993) ("If, before the Court had decided the case, either party had advised it of a material change in circumstances that entirely terminated their controversy, it would have been proper *either* to dismiss the appeal *or* to vacate the entire judgment of the District Court.") (emphasis added).

[9] *See Karcher*, 484 U.S. at 83. A number of courts have agreed with petitioner's interpretation of *Karcher*. *See Clarendon Ltd v. Nu-West Indus., Inc.*, 936 F.2d 127, 130 (3rd Cir. 1991); *National Union Fire Ins.*, 891 F.2d at 766; *Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, 842 (6th Cir. 1988); *United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988).

[10] USBr 10 n.7. *See also Clarke v. United States*, 915 F.2d 699, 709-18 (D.C. Cir. 1990) (Edwards, J., dissenting, joined by Mikva, Ginsburg, Robinson, JJ.). Contrary to respondents' argument (RBr 14-15), the summary order in *Davis v. City and County of San Francisco*, 984 F.2d 345 (9th Cir. 1993), is not a retreat from the Ninth Circuit's approach to vacatur on settlement. It describes neither Ninth Circuit precedent nor the factors leading to the vacatur.

Respondents' and the Government's insistence that this Court's summary decisions mandate vacatur on settlement is misplaced.[11] Summary decisions in general have less precedential value than opinions on the merits of the question.[12] Moreover, these summary decisions are particularly weak as precedent because they were rendered in the absence of adversarial briefs or even opinions addressing the conflicting analyses of courts and commentators.[13] Furthermore, the precedents on their terms are not very strong: there are older decisions ordering only dismissal, not vacatur, after settlement;[14] most of the cases involve a *government* as a party rather than only private parties;[15] and not all of the cases cited are settlement situations.[16]

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[11] Indeed, *Stewart v. Southern Ry.*, 315 U.S. 784 (1942), cited by both respondents and the Government, in which this Court vacated its *own* judgment when the parties settled *after* the Court's decision (a procedure which should not be a routine practice) demonstrates the pitfalls of wholesale adherence to summary decisions.

[12] *See Edelman v. Jordan*, 415 U.S. 651, 671 (1974); Robert L. Stern et al., *Supreme Court Practice* § 4.29 (6th ed. 1986).

[13] *See Cardinal*, 124 L. Ed. 2d at 19 (Scalia, J., separate opinion).

[14] *Buck's Stove & Range Co. v. American Fed'n of Labor*, 219 U.S. 581 (1911); *Mills v. Green*, 159 U.S. 651 (1895); *Dakota County v. Glidden*, 113 U.S. 222 (1885).

[15] *See* USBr 19 (distinguishing between circumstance where the Government is a party and where only private parties are involved). *See also* note 8, *supra*.

[16] Of those that involve settlement, many involve multiparty suits where some of the parties settle but others do not, and vacatur could provide consistency in the judgment. *Chicago & North Western Ry. v. Atchison, Topeka, & Santa Fe Ry.*, 387 U.S. 326, 340 (1967); *Pierce v. Underwood*, 487 U.S. 552, 556 (1988). Moreover, in at least one of respondents' cited cases, *Continental Casualty Co. v. Fibreboard Corp.*, 113 S. Ct. 399 (1992), there was no settlement by the parties to the case before this Court. The set-

[footnote continued]

This hodgepodge of precedent cannot be read as always requiring vacatur regardless of the reason for mootness or any other circumstances. The Government itself correctly repudiates such a monolithic view, recognizing many situations where vacatur is not proper. It urges different answers according to the reason for mootness,[17] according to whether the parties ask for vacatur[18] (even though the case would be equally moot regardless of such a request), perhaps according to whether the appeal is discretionary or as of right,[19] whether the case involves an administrative agency or court adjudication,[20] whether (in some undefined way) "the judicial system itself has a distinct and legitimate interest in preserving the judgment below,"[21] and whether "the particularly 'strong public interest in the finality of judgments in patent litigation' " is implicated.[22] The Government also repeatedly emphasizes that special considerations may justify a rule of vacatur in government cases, just as, under *United States v. Mendoza*, 464 U.S. 154 (1984), special considerations justify an exception to the usual rules of nonmutual collateral estoppel in government cases.[23]

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tlement was in a *related* case involving only one of the parties in this Court. This Court merely vacated and remanded to the Ninth Circuit to *consider* whether the case was moot.

[17] The Government says that mootness caused by action of the prevailing party should result in vacatur, but mootness caused by action of the losing party should not (USBr 13 n.12).

[18] USBr 10 n.10.

[19] *Id.* at 18 n.19.

[20] *Id.* at 26 n.26.

[21] *Id.* at 27 n.27.

[22] *Id.* at 25 n.24 (quoting *Cardinal*, 124 L. Ed. 2d at 17).

[23] USBr 17, 18 n.18, 19, 24. As noted above, almost every decision of this Court cited by respondents and the Government as

[footnote continued]

Thus, a rule of vacatur upon settlement cannot be drawn from *Munsingwear's* rule of vacatur upon happenstance-caused mootness or this Court's summary orders.[24] The question of whether and under what mode of analysis the courts of appeals should vacate district court judgments at the request of settling parties remains open for the Court's full consideration.

II. ESTABLISHED COLLATERAL ESTOPPEL LAW ALREADY STRIKES THE BALANCE BETWEEN FINALITY AND FAIRNESS

The Government criticizes petitioner's reliance "on the public and private interests in the finality of judicial decisions, especially as embodied in the doctrine of nonmutual collateral estoppel" (USBr 19). But it is precisely those interests that are at stake in deciding the vacatur question. And the importance of these finality interests – to the judicial system and other potential litigants – has been repeatedly reaffirmed by this Court, particularly in adopting nonmutual defensive[25] and offensive[26] collateral estoppel.

Thus, in *Blonder-Tongue,* the Court stressed the public policy against wasting judicial resources and unreasonably burdening a second defendant in holding that a claim rejected in a full and fair trial should not be relitigated

providing the basis for applying the *Munsingwear* procedure to settlement on appeal has been a case involving either the federal or a state government.

[24] In any event, the Court is free to refine, modify, or abandon earlier common-law principles when there are good reasons for doing so. The Government itself openly argues for departure from some of this Court's precedents on vacatur (USBr 13 n.12).

[25] *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971).

[26] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

against a different defendant. 402 U.S. at 329. In approving nonmutual defensive collateral estoppel, the Court found that evaluating the first trial as "full and fair" was a sufficient safeguard.[27]

Similarly, in *Parklane,* the Court considered and rejected the arguments that offensive use of collateral estoppel (1) does not promote judicial economy, (2) provides incentive for prospective plaintiffs to take a "wait and see" attitude, (3) will likely increase rather than decrease the total amount of litigation, and (4) may be unfair to defendants, *id.* at 329-31, all echoed here by respondents and the Government. The Court "concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[28] Likewise, the Court should reject these arguments as a basis for routine vacatur that would eliminate even the possibility of collateral estoppel, and instead should adopt a rule favoring denial of vacatur, leaving the determination whether the judgment should have preclusive effect to the court later asked to give it such effect.

In seeking to counter the force of this reasoning, the Government and respondents argue that appellate review is needed before a district court judgment can be final and preclusive (USBr 19-21; RBr 25). But exactly the *opposite* conclusion is reached in the federal common law of preclusion. For at least fifty years, the courts clearly and unequivocally have treated a district court judgment as entitled to preclusive effect as soon as it is

[27] *Id.*; *Parklane*, 439 U.S. at 328.

[28] *Id.* at 331. As Amicus, the Government supported affirmance of the appellate court's application of collateral estoppel.

rendered, *even if it is on appeal. See, e.g., Huron Holding Co. v. Lincoln Mine Operating Corp.*, 312 U.S. 183 (1941); 1B James W. Moore et al., *Moore's Federal Practice*, ¶¶0.416[1], 0.416[3] at 311, 318 (2d ed. 1993); Restatement (Second) of Judgments §13 & cmt f (1982). That it is fundamentally fair to accord district court judgments immediate preclusive effect, given the interests of the judicial system and other litigants, reflects our legal system's commitment to treating the trial, not the appeal, as "the main event." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).[29]

The law of preclusion does, of course, provide safeguards against unfairness in giving a decision preclusive effect. It does so, however, not by any blanket denial of preclusion absent appellate review, but by directing the court in which estoppel is invoked to make the fairness determination. Restatement (Second) of Judgments §28 (1982). That is the flexible procedure that a rule against vacatur allows but that a rule of automatic vacatur forecloses.

In this case, for example, there is no reason to question the fairness of applying the Florida judgment collaterally. There is no evidence that Windmere settled because it lacked confidence in the district court's judgments; it filed briefs in the Federal Circuit which indicate just the

[29] The Government's recitation of the "core purpose of finality" attempts to focus the inquiry solely on the parties' interests. However, as developed in *Blonder-Tongue* and *Parklane*, nonmutual collateral estoppel was adopted to serve important interests which transcend the interests of the parties and the resolution of their particular dispute – including judicial economy and the interests of other parties affected by the finality of the judgment. The Government's argument ignores these important underpinnings of nonmutual collateral estoppel.

opposite.[30] The district court in Florida found no flaws in the jury's verdict, and the district court in Illinois found the Florida trial to be fundamentally fair. In addition, Philips did not even condition its acceptance of the settlement terms on vacatur of the district court judgment, further undercutting any implication that the district court judgment was viewed as reversibly flawed. More generally, if the particular circumstances of a settlement were to suggest the unreliability of a district court judgment, those circumstances could be taken into account by a court deciding whether to impose collateral estoppel or to grant a motion to vacate.

The Government and respondents attempt to escape the clear balance between finality and fairness struck by preclusion law, but their attempt confuses a judgment unreview*ed* by virtue of a voluntary decision of the parties to settle with a judgment that is unreview*able* by virtue of extra-litigation events or circumstances. Under the law of collateral estoppel, a district court judgment is not entitled to preclusive effect if the losing party has no legal right to take an appeal. *See* Restatement (Second) of Judgments §28(1) (1982) (no issue preclusion if "party against whom preclusion is asserted could not, *as a matter of law*, have obtained review of the judgment in

[30] Both the Government and respondents challenge the reliability of a district court judgment whenever the parties reach a compromise settlement on appeal (USBr 22; RBr 25). This argument is unsupported speculation, obviously depends on the particular terms of the settlement agreement on a case-by-case basis, and is contrary to the facts of this case. Here, Philips agreed to a $57 million payment to Windmere which far exceeded the district court's award of $30 million in actual damages. It was strictly a compromise of the amount of *increased* damages awarded by the court. Thus, the terms of the agreement neither expressly nor implicitly reveal any mutual distrust of the reliability of the district court judgment.

the initial action") (emphasis added). But that principle has no more application to a settlement that renders a decision unreviewed than to a case in which the time for appeal has simply been allowed to expire.

The Government and respondents suggest the contrary, attempting to support their expressed suspicion of unreviewed judgments by reference to *Standefer v. United States,* 447 U.S. 10 (1980) (RBr 25; USBr 21). In *Standefer,* however, the Court denied preclusive effect to a criminal acquittal because the losing party, the Government, was barred *by law* from taking an appeal and therefore had no means of correcting (or deterring) even the most egregious errors, no matter how much it wanted appellate review. *Id.* at 23.

The judgment in *Standefer* was truly "unreviewable"; a judgment that the losing party could have appealed, but simply chose not to, is not. This distinction is in harmony with the distinction between the *Munsingwear* mootness by "happenstance" and mootness by freely chosen settlement. A refusal to extend *Munsingwear* to the situation of settlement on appeal is therefore strongly supported by the policy balance long struck in the law of collateral estoppel.

III. CONSIDERATIONS OF JUDICIAL EFFICIENCY, THE PUBLIC INTEREST, AND THIRD PARTY INTERESTS SUPPORT GENERALLY DENYING VACATUR

In arguing against petitioner's position, the Government points out that "as this Court's decision in *United States v. Mendoza,* [464 U.S. 154, 163 (1984),] indicates, the interests favoring application of nonmutual collateral estoppel are not absolute and must give way to countervailing considerations in appropriate circumstances"

(USBr 20). However, the interests involved – judicial efficiency, other public interests, and the interests of third parties – all *support* a rule against vacatur.

A. Judicial Efficiency. Judicial efficiency favors denying vacatur at the appellate stage as a general proposition. In arguing that a rule of vacatur saves judicial resources by encouraging settlement on appeal (USBr 16), the Government ignores the greater significance of the cost of vacatur – the fostering of *other* litigation by the elimination of collateral estoppel. Both sides of this ledger must be considered. In particular, the increase in litigation caused by foreclosing collateral estoppel has a direct adverse effect on the congested dockets of the federal district courts. Moreover, the supposed savings to the appellate court (or this Court) may be illusory: review of the legal issues may simply be deferred to the next case. And if vacatur is routinely available even after full briefing and scheduling of argument, or even after hearing of argument, extensive appellate resources may already have been spent and other litigants pushed back in line.

The Government's save-now/pay-later approach is based entirely on the assumption, without any evidentiary support and in contradiction to the very facts of this case, that "in most cases the possibility of such future preclusive use is entirely speculative" (USBr 23). This is contrary to common sense. The Government itself identifies the future preclusive use or precedential value of a district court decision as *the* reason a litigant may be deterred from settling absent vacatur (USBr 16-17). Thus, the touted savings from a pro-vacatur rule occur *precisely* in those cases where litigation is, far from being speculative, most definitely contemplated. Accordingly, it is in cases where vacatur is sought that further lawsuits – perhaps multiple suits – are *most* likely. The Government's assertion that current savings outweigh future costs, in

short, is not only unsupported but seems exactly backwards. A rule against vacatur, by preserving collateral estoppel, seems the litigation-minimizing rule.

Denial of vacatur also produces savings in litigation costs by encouraging settlement prior to trial. Although the Government and respondents point to the high cost of litigating unsuccessfully as itself an incentive to settle before trial (USBr 17 n.17; RBr 36-37), the Government acknowledges that the adverse judgment and its potential preclusive or precedential effect are often the most important concern of the unsuccessful litigant (USBr 16-17). Since vacatur on appeal decreases the risk to such a litigant by alleviating its most important concern, the availability of routine vacatur inevitably encourages going forward with the trial rather than settling.

Recently, the U.S. District Court for the District of Colorado considered these various arguments regarding judicial efficiency and wrote that:

> Parties have ample opportunity to settle early on, before more and more judicial and party resources are expended on their behalf. For example, some magistrate judges in this district typically hold an average of three settlement conferences per litigant, and may hold as many as eight to ten per litigant in some complex and protracted cases. Yet vacatur provides no incentive for early settlement and in fact encourages litigants to roll the dice on a district court ruling so long as they can settle to pay their way out of both the ruling and the adverse precedent. The Second Circuit's view that vacatur is conducive to settlement is not only empirically unsupported but runs contrary to the experience of this and other district courts: specifically, that vacatur saves far less in circuit court resources than, by its perverse incentive for litigants to stall on settlement until after judgment, it costs the district courts and the parties. Vacatur is simply not efficient judicial resource management.

Benavides v. Jackson Nat'l Life Ins. Co., No. 92-F-65, slip op. at 7-8 (D. Colo. May 6, 1993) (citation omitted) (copy appended hereto).

This assessment is in complete accord with the facts of this case. Dispensing with the Federal Circuit's oral argument and decision in this case is small gain by comparison to the increased litigation that will result from upsetting the collateral estoppel decision in Illinois.

B. The Public Interest. In *Blonder-Tongue*, the Court recognized the particularly strong public interest in the finality of judgments of patent invalidity. Recently, the Court reaffirmed that interest in *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 124 L. Ed. 2d 1, 17 (1993). Although the facts and issues in *Cardinal* are different from those here, the decision in *Cardinal* follows *Blonder-Tongue* in underscoring the strong public interest in the free use of ideas unprotected by patents. The Court has recognized that public interest in other practices affecting free competition, including the right to use designs in the public domain. The public interest in finality thus is particularly important here.[31]

As a result of the district court judgment in Florida and the ruling in Illinois, Philips has no trade dress right in the functional design of its rotary shavers and, consist-

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[31] Respondents argue that Philips' unfair competition claim "is so different from a patent claim that the concerns expressed in *Cardinal* are not relevant to this action" (RBr 24). To the contrary, this Court has recognized that "publicly known design and utilitarian ideas which were unprotected by patent occupied much the same position as the subject matter of an expired patent." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989). *See also Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). The Illinois district court ruled that Philips' alleged trade dress had fairly been found to be functional and hence not protectable (Pet. A29), and its trade dress claim therefore stands on no different footing than an expired or invalid patent.

ent with the philosophy expressed in *Blonder-Tongue, Bonito Boats,* and *Cardinal,* all are free to use the design at issue. Under the settlement and vacatur, however, Izumi shavers can be sold by Windmere, but Philips seeks the right to enjoin Sears (and anyone else) from selling shavers of the same design, leading to potential suits in different districts. It was to avoid the burdens of multiple litigation with possible disparate results, and its adverse effect on competition, that the Court permitted nonmutual defensive collateral estoppel. A general rule of vacatur on demand as practiced by the Federal Circuit undermines the Court's deference to this important public interest as reflected in *Blonder-Tongue, Cardinal,* and *Bonito Boats.*

C. The Effect on Third Parties. The Government takes petitioner to task for urging consideration of the adverse effect of vacatur on non-litigants such as Izumi and Sears in preference to the interests of the parties themselves (USBr 20). But the interests of third parties should no more be ignored in vacatur cases than they are in estoppel law. Here, for example, they are especially weighty.

The terms of the settlement involve only actions to be taken by the parties to that agreement. Vacatur by the court is not a condition of the settlement, and thus each of Philips and Windmere received the consideration for which it bargained, irrespective of the Federal Circuit's decision on vacatur. Neither Izumi nor Sears was invited to be part of the agreement or negotiate with Philips and Windmere. Yet, the Federal Circuit entered a vacatur order that directly and immediately affects Sears, as a litigant in Illinois, and Izumi, as Sears' manufacturer and indemnitor – forcing them to bear the burden of litigation against Philips on issues Philips has already lost, after full and fair proceedings. It is not unfairly elevating the

interests of Izumi and Sears over those of Windmere and Philips to consider the effect of the vacatur on Izumi and Sears along with the effect of vacatur on judicial efficiency and the public interest.

If this Court adopts a rule generally denying vacatur when parties settle on appeal, then the Federal Circuit's grant of vacatur must, of course, be reversed.[32] But even under a more flexible balancing of finality considerations versus fairness, the Federal Circuit's granting of vacatur in this case would still be in error.[33]

There can hardly be a more inappropriate case for vacatur – huge judicial and private party resources already

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[32] Contrary to their arguments (RBr 27-30), respondents fail the three-part test in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). Instead of relying on the Federal Circuit's precedent of vacatur, respondents' settlement agreement specifically provided that the settlement would not be affected even if the district court's judgment was not vacated (J.A. 159a-60a), and they cannot plead ignorance of the criticism of the automatic vacatur rule in other circuits. In addition, it is undisputed that at least Windmere knew that Izumi opposed vacatur (J.A. 167a). More importantly, for all the reasons set forth above, the equities weigh in favor of retroactive application of this Court's decision to the Philips/Windmere motion. Finally, the vitality of *Chevron* is questionable. *See James B. Beam Distilling Co. v. Georgia,* 111 S. Ct. 2439 (1991).

[33] The Government proposes that the standard for entry of a consent decree be used to provide flexibility to the decision of courts of appeals as to whether to grant a motion to vacate on settlement (USBr 27-28). Petitioner is not aware of any circuit court of appeal adopting such a standard. Moreover, it is based on the primacy of the parties' settlement interests and is more adapted to district court evaluation in the pretrial context rather than post-trial relief from judgment. The finality interests identified by this Court in its decisions on collateral estoppel, discussed above, provide the most analogous and most informative factors for determination of the approach to vacatur since the central philosophical issue is whether to eliminate or leave open the possibility of subsequent preclusive effects.

spent, further existing litigation avoided but for vacatur, and the strong public interest in maintaining the result obtained.[34] For all these reasons, the Court should reverse the decision below.

IV. IZUMI IS A PROPER INTERVENOR AND PARTY TO THIS APPEAL

Respondents' attempt to minimize Izumi's stake in this controversy fails to show that Izumi's interest in opposing vacatur is not a significantly protectable interest.[35] Viewed objectively, the interests of others who have been permitted to intervene on appeal were no greater than Izumi's. *See also Commonwealth Land Title Ins. Co. v. Corman Constr., Inc.*, 61 U.S.L.W. 3818 (U.S. June 7, 1993) (motion to intervene to petition for certiorari granted for an insurer that financed the legal defense of a party and faces claims if an unfavorable court decision is not appealed).

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[34] Contrary to respondents' portrayal of Philips as the innocent victim of unfair trials and Izumi as a bad faith intruder, the Illinois district court had specifically determined that Philips had a full and fair trial in Florida (Pet. A29-30). Izumi's interests as manufacturer of the products at issue and indemnitor of Windmere and Sears make it anything but an intruder. Finally, respondents improperly charge Izumi with holding back until Philips gave up its right of appeal. It is undisputed that Izumi told Windmere that it objected to vacatur even before the settlement agreement was reached, asked Windmere to convey this objection to Philips, and acted immediately to oppose the Philips/Windmere motion to vacate when it was filed (J.A. 167a-68a).

[35] After spending millions in defense of its right to market its rotary shavers in the United States, resulting in two jury verdicts in which Philips' alleged trade dress was found to be legally functional and unprotectable, Izumi now faces substantial additional legal expenses to defend Sears, another of its indemnitees, against the same trade dress claims, and faces further injury to its rotary shaver business if Philips prevails in the third trial.

Moreover, respondents demonstrate the timeliness of Izumi's motion by what they fail to assert. Respondents have not argued that Izumi's interests were inadequately represented during trial or during briefing of the appeal. Respondents do not contest that Windmere stopped representing Izumi's interest when it settled with Philips. Respondents have not disputed that Izumi moved to intervene as soon as the motion to vacate was filed. Thus, Izumi's motion to intervene was timely.[36]

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[36] Although Izumi did not separately include standing to intervene as a Question Presented in its petition for certiorari, the issue of standing was fully briefed in the petitions for certiorari, (Pet. Cert. 14-16; Opp. 4-5; Reply 2-3) and respondents explicitly raised the issue in their Counterstatement of Questions Presented (Opp. i). Thus, neither respondents nor this Court were prejudiced by any failure to consider this issue. Izumi's standing to oppose vacatur can be viewed as fairly included within the question of whether the court of appeals erred in vacating the district court judgment. Sup. Ct. R. 14.1(a). In any event, the denial of intervention when Izumi's rights are clearly at stake was a plain error, evident from the record and within this Court's jurisdiction to decide. Sup. Ct. R. 24.1(a); *See Peters v. Kiff*, 407 U.S. 493, 495 (1972). Sound principles of judicial economy favor deciding this case. *New York v. Uplinger*, 467 U.S. 246, 250-51 (1984) (Stevens, J., concurring).

V. CONCLUSION

For these reasons and the reasons set forth in petitioner's brief on the merits, the Court should reject the Federal Circuit's practice, reverse the decision of that court, and reinstate the Florida district court judgment.

Respectfully submitted,

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June 21, 1993

APPENDIX

[Filed May 6, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-F-65

CHRISTINE BENAVIDES,

Plaintiff,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant.

ORDER REGARDING ORDER AND MANDATE DIRECTING VACATUR

Sherman G. Finesilver, Chief Judge

This is a case involving a contested life insurance policy. Jurisdiction is based upon 28 U.S.C.A. §1441(a). We entered a final judgment in this matter on November 17, 1992 and the judgment was appealed. This matter comes before the District Court following the order of the Court of Appeals for the Tenth Circuit directing this Court to vacate its prior judgment and order and to dismiss the complaint. For the reasons explained below, we must respectfully decline to vacate our prior judgment pending a reasoned and more detailed order from the Court of Appeals.

I.

On March 29, 1989, Epitacia Benavides and his wife, Plaintiff Christine Benavides, entered a State Farm Insurance Office to inquire about buying a life insurance policy. After a meeting with two agents of Defendant Jackson National Life Insurance Company, the facts of which were disputed in the parties' briefs on Jackson's motion for summary judgment, Mr. Benavides decided to purchase the policy. On the questionnaire he filled out to accompany his policy application, Mr. Benavides denied having any past or current medical problems.

The agents issued Mr. Benavides an "Interim Insurance Receipt" ("Interim Receipt" or "Receipt"), dated, like the Application, March 29, 1989. The Interim Receipt provided that Mr. Benavides would be insured by Defendant until Defendant either rejected or approved his application. If Defendant approved the application, a more permanent policy would be issued. The Receipt stated that it would terminate automatically when Jackson approved the policy. The Receipt also stated that it was "not a binder." As consideration for the Interim Receipt, Mr. Benavides paid his first premium in the amount of $40.29. On April 17, 1989, Defendant issued Mr. Benavides a life insurance policy ("the Final Policy").

Mr. Benavides paid his insurance premiums until April 3, 1991, when he died of atherosclerotic cardiovascular disease. Approximately two weeks later, Mrs. Benavides presented her claim as the primary beneficiary of the policy. Upon researching Mr. Benavides' medical history, Defendant concluded that he had materially misrepresented his health on his application and accordingly denied payment of benefits. Plaintiff filed suit in state court on December 13, 1991, alleging breach of con-

tract. Defendant raised as a defense Mr. Benavides' alleged material misrepresentation regarding his health. Defendant filed a motion for summary judgment, and Plaintiff was later granted leave to move for summary judgment on her own behalf.

The issue before this Court in its prior order was whether the Policy was incontestable as of the date of Mr. Benavides' death. In an order and judgment unfavorable to Jackson, we concluded the Policy's incontestability clause was ambiguous and that a finding of incontestability would thwart the purpose and policy behind the statute providing for incontestability clauses. Jackson filed notices of appeal with the Tenth Circuit Court of Appeals on December 16, 1992 and January 29, 1993, but before appeal could be perfected on the merits; on April 2, 1993, the parties filed a joint motion to vacate and dismiss. On April 9, 1993, the Court of Appeals, stating that the appeals had been settled and were dismissed as moot, further directed this Court to vacate its prior judgment in the case. The order, in its entirety, states:

> Pursuant to Rule 42(b), Fed.R.App.P., and the Joint Motion To Vacate and Dismiss submitted by the parties, these appeals have been settled and are hereby dismissed as moot. The case is remanded to the district court with instructions to vacate the judgment entered on November 23, 1992, and the subsequent judgment entered on December 23, 1992. The district court is further directed to dismiss the complaint. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Beattie v. United States*, 949 F.2d 1092, 1095 (10th Cir. 1991); *Tosco Corp. v. Hodel*, 826 F.2d 948 (10th Cir. 1987).
>
> Each party shall bear its own costs and the mandate shall issue forthwith.

II. Vacatur

The Court of Appeals cited as authority for its order of vacatur three cases, including *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), *Beattie v. United States*, 949 F.2d 1092, 1095 (10th Cir. 1991), and *Tosco Corp. v. Hodel*, 826 F.2d 948 (10th Cir. 1987). We do not believe these cases are responsive to the issue in the instant matter.

A. The Rule and Rationale of the Supreme Court

In *Munsingwear*, the United States' allegations of price-fixing by the defendant became moot when, while the case was pending appeal, the commodity involved was deregulated. The Court established the rule that judgments rendered below should be vacated when cases, by chance, become moot pending appeal. 340 U.S. at 39. The rule "clears the path for future relitigation of the issues between the parties and eliminates a judgment, *review of which was prevented through happenstance.*" *Id.* at 40 (emphasis added). *Munsingwear* thus preserves the rights of the parties and ensures that no party is subject to res judicata on a claim or issue which it cannot appeal. On the other hand, "*Munsingwear* teaches that when a case is mooted through no fault of the parties, the maintenance of the judgment may be prejudicial to a party who has lost the opportunity to challenge such a judgment on appeal." *See* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 592-93 (March 1991) (hereafter *Rewriting History*).

In *Karcher v. May*, 484 U.S. 72, 81-83 (1987), the Court further clarified the rule in *Munsingwear*. The presiding legislative officers of the New Jersey legislature had

twice lost in the lower courts when those courts determined that New Jersey's law mandating a moment of silence in schools was unconstitutional. Before appeal was filed in the Supreme Court, the appellants lost their posts as presiding officers and their successors withdrew the legislature's appeal. The Court declined to order vacatur of the lower courts' judgments because the case was moot for lack of jurisdiction. Further articulating the *Munsingwear* rationale, the Court stated "the controversy did not become moot due to circumstances unattributable to any of the parties." *Id.* at 83. Rather, the losing party, represented by new officers, voluntarily declined to pursue any appeal.

The rule, then, for vacating judgments is that (1) the case must become moot and (2) that it must become moot through no controllable, voluntary action attributable to the parties.

B. Vacatur in the Tenth Circuit

One of the cases cited by the Tenth Circuit in its brief instruction to vacate is entirely distinguishable on its facts from the instant case and the other, like the order of vacatur in this case, does not address the policies against vacatur and the limitations imposed by the Supreme Court.

For example, in *Beattie*, a firefighter with the Boeing Military Airplane Company brought suit for declaratory judgment and injunctive relief against the United States, alleging that the Air Force's denial of his access to certain sensitive areas violated his constitutional rights. Before the case even came before the district court on summary judgment, the plaintiff voluntarily quit his job. The district court nevertheless found the case was not moot and

ruled on the motion for summary judgment. The Tenth Circuit reversed, concluding the case was moot at the time the district court had entered its judgment and therefore the district court lacked jurisdiction to enter judgment in a moot case. 949 F.2d at 1095. Unlike the case before us, *Beattie* was moot before the district court even ruled on it. The Court of Appeals properly concluded no judgment could enter on an already moot case.

In *Tosco*, the Tenth Circuit addressed only briefly the issue of vacatur. It did not illustrate why vacatur was appropriate in that case but rather cited two distinguishable Supreme Court cases without explanation of their applicability. 826 F.2d at 948 (*citing Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983) (holding that university's new policy against discriminatory acts of all-male honorary society mooted the society's appeal seeking to prevent Secretary of Health, Education and Welfare from interpreting the law to require the university to ban society's activities from campus); *Great Western Sugar Co. v. Nelson*, 422 U.S. 92 (1979) (holding that completed arbitration pending appeal mooted district court's order directing arbitration)).

Both *Iron Arrow* and *Great Western* found vacatur proper only where changed circumstances prohibited the appeals courts from granting relief from the judgment below. In *Iron Arrow*, the university's policy had changed such that the Secretary's interpretation became irrelevant; "whatever the correctness of the Secretary's interpretation of the regulation in question, the University has stated unequivocally that it will not allow Iron Arrow to conduct its initiation activities on University property." Therefore any complementary instruction by the Secretary was moot. 464 U.S. at 70-71. In *Great Western*, the decision ordering arbitration was moot and unchallenge-

able once arbitration had already begun and run its course. However, settlement in no way moots a case, *see, e.g., Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280, 281 (2d Cir. 1985), as will be explained below.

C. Policy in Support of Limited Application of the Rule

That *Munsingwear* is inapplicable to situations involving settlements of cases pending appeal is amply illustrated by both the Supreme Court's recent grant of certiorari on the issue[1] and the division among the circuits on vacatur of district court judgments. The Third, Seventh, and District of Columbia Circuits (the plurality of circuits) have held that requests for vacatur based on a post-judgment settlement should be refused. *Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127 (3rd Cir. 1991); *In re United States*, 927 F.2d 626 (D.C. Cir. 1991); *In the Matter of Memorial Hosp., Inc.*, 862 F.2d 1299 (7th Cir. 1988). The Ninth Circuit has adopted a balancing approach that essentially follows the plurality of circuits in distinguishing among cases made moot by circumstances and cases made moot by an act of the appellant. *Scott v. Iron Workers Local 118*, 928 F.2d 863 (9th Cir. 1991); *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982). The Second and Federal Circuits, stressing the importance of settlement and conservation of judicial and party resources, have held that district

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[1] *See U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992), *reh'g denied* (1992), *cert. granted by Kaisha v. Philips Corp.*, 113 S.Ct. 1249, 61 U.S.L.W. 3580 (Feb. 22, 1993) (No. 92-1123).

court judgments are subject to vacation when litigants enter into voluntary post-judgment settlements. *See, e.g., U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992), *reh'g denied* (1992), *cert. granted by Kaisha v. Philips Corp.*, 113 S.Ct. 1249, 61 U.S.L.W. 3580 (Feb. 22, 1993) (No. 92-1123) (granting certiorari on issue of vacatur's propriety following settlement); *Long Island Lighting Co. v. Cuomo*, 888 F.2d 230 (2d Cir. 1989); *Smith Int'l, Inc. v. Hughes Tool Co.*, 839 F.2d 663 (Fed. Cir. 1988); *Nestle Co.*, 756 F.2d 280.

As we explained in *Russell v. Turnbaugh*, 774 F. Supp. 597 (D. Colo. 1991), we find the reasoning of the plurality of circuits more persuasive, particularly the exposition by Judge Easterbrook in *Memorial Hospital*, 862 F.2d at 1300-03. On the other hand, we believe the Court in *Nestle* read *Munsingwear* far too broadly, perhaps incorrectly, when it stated "district court judgments that become moot pending appeal must be vacated." 756 F.2d at 281. As we have previously noted, *Munsingwear* requires for vacatur not only that the judgment become moot, but that such mootness arise through no action of the parties. Furthermore, the Court in *Nestle* simply made a policy choice, which we are free to disregard and the Tenth Circuit free to reinstate, favoring settlements over the finality of judgments. *Id.* at 283. Although this Court has traditionally encouraged settlement during the pretrial phase of litigation, we believe the costs of vacatur following post-judgment settlements on appeal are too high.

Our opinion in *Russell* cited numerous authorities disapproving the lack of res judicata effect given vacated judgments, the prospect of continued litigation of settled cases, and the disincentive to early settlement at the trial level, where most settlement – and therefore the

most conservation of resources – is achieved. *Id.* at 600; *see also* Fisch, *Rewriting History, supra,* at 592 (concluding that post-judgment vacatur distorts the settlement process, delays settlement to waste judicial resources, and engenders disrespect for the courts by "perverting" the judicial decision into a negotiable commodity). We noted that, contrary to the claims of the Court of Appeals in *Nestle,* vacatur may not be the policy most conducive to conservation of judicial resources. For example, we have relitigated issues already decided but later vacated after a dilatory settlement. In *Tosco Corp. v. Hodel,* 611 F. Supp. 1130 (D. Colo, 1985), after over two decades of litigation, several appeals to the Supreme Court, and the commencement of congressional oversight, the trial court poured substantial resources into crafting an exhaustive, widely-circulated, 86-page opinion that could have effectively served as a primer on the Mineral Leasing Act of 1920 and painstakingly detailed the economic, historical, and legal aspects of oil shale and other mineral leasing rights. The litigants settled their dispute pending appeal. The Tenth Circuit directed that the order and judgment be vacated. *Tosco,* 826 F.2d 948. As a result of the vacatur, many of the identical mining issues had to be relitigated in *Marathon Oil Co. v. Lujan,* 751 F. Supp. 1454 (D. Colo. 1991), *aff'd in part and rev'd in part,* 937 F.2d 498 (10th Cir. 1991).

Parties have ample opportunity to settle early on, before more and more judicial and party resources are expended on their behalf. For example, some magistrate judges in this district typically hold an average of three settlement conferences per litigant, and may hold as many as eight to ten per litigant in some complex and protracted cases. Yet vacatur provides no incentive for early settlement and in fact encourages litigants to roll

the dice on a district court ruling so long as they can settle to pay their way out of both the ruling and the adverse precedent. *See id.* at 595-96. The Second Circuit's view that vacatur is conducive to settlement is not only empirically unsupported but runs contrary to the experience of this and other district courts: specifically, that vacatur saves far less in circuit court resources than, by its perverse incentive for litigants to stall on settlement until after judgments, in costs the district courts and the parties. Vacatur is simply not efficient judicial resource management.

We have agreed with the Seventh Circuit's view in *Memorial Hospital*, 862 F.2d at 1300, that a judicial decision is a public act, created with societal resources for the purpose of resolving current disputes and providing guidance in future matters. *Russell*, 774 F. Supp. at 595-96. Once a case is decided in a district court and the machinery of the public's justice system begins to operate, the decision becomes a part of the court's and the country's jurisprudence. Particularly in an era in which opinions can be immediately transmitted and published across the nation via computer databases, decisions no longer belong merely to the litigants. Their precedential value can be diminished by an appellate court's vacation, but they can never be erased and their reasoning may continue to be followed. In *Russell*, we disapproved of the use of judicial opinions as a bargaining commodity and concluded that judicial decisions are not for sale. *Id.* We now elaborate on our views in *Russell* in order fully to illuminate the difficulties posed by vacating judgments based upon no more cause than that the parties have reached a settlement.

D. Further Policy Implications of Judgment Vacation as a Condition of Settlement

In the normal and traditional operation of the American justice system, each party walks to the courthouse with a compilation of opinions in its favor under one arm and a collection of opposing views under the other. It is then not uncommon for the parties, under the court's supervision, to place the weight of case law for and against their positions on the appropriate side of the court's judicial scales. In many instances, particularly in litigation involving institutional litigators understandably enamored with the majority approach, one or both parties may state that "the weight of authority" supports their view. A string of citations follows. Courts may then, for understandable reasons, accept the majority view as the view tending toward more stability and predictability in the law and toward fewer accusations of renegade activism.

Given this background of deference to majority common law, vacatur becomes an important litigation tool, particularly for institutional litigators who must return to court many times with the same arguments. When a court rejects the arguments of institutional litigators such as Jackson, an insurance company, the institutions are dealt a crippling blow not only in the case at bar but in future litigation. Vacatur allows disappointed litigators effectively to rewrite history. Vacatur allows them to control the direction and content of the jurisprudence – to weed out the negative precedent and preserve the positive – and create an artificially weighty and one-sided estimate of what comprises "the case law." This phenomenon has been amply catalogued in the mainstream legal literature. *See, e.g.*, Roger Parloff, *Rigging the*

Common Law, THE AMERICAN LAWYER (March 1992); Gail Diane Cox, *Innovation – Or Just Court Triage?* NATIONAL LAW JOURNAL, Oct. 5, 1992, at 1.

A party that can erase negative precedent through vacatur views the lower court's judgment as a bargaining chip: in exchange for the victor's agreement to relinquish the precedential value of the judgment, the loser will offer some form of inevitably pecuniary sweetener. For example, the loser offers not to create the expense and risk of reversal inherent in appeal, or the loser may offer more in a settlement with the victor than the victor initially received, or even demanded in the complaint. At the same time, the victor, notably, is typically not a repeat litigator and has little interest in preserving the precedential value of the judgment below. The victor has little reason to resist vacatur and take its chances on appeal.

The case law becomes what the party with the greatest resources wishes it to be. Economic prowess purchases more persuasive power than the marketplace of ideas and sound reasoning combined. Vacatur allows wealthy litigants to become, in effect, editors of their own treatises on the subjects which concern them. We have no kind words for such a practice. We can imagine few practices condoned by the judicial system that would have a less salutary effect on both the reality and the perception of its integrity.

III.

Accordingly, we must respectfully decline to vacate our prior judgment pending a reasoned and more detailed order from the Court of Appeals.

Dated this 6th day of May 1993, at Denver, Colorado.

BY THE COURT:

/s/ Sherman G. Finesilver
Sherman G. Finesilver, Chief Judge
United States District Court